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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 541

MICHIGAN CONSOLIDATED GAS COMPANY, a Corporation,
Petitioner,

v.

FEDERAL POWER COMMISSION, PANHANDLE EASTERN PIPE LINE COMPANY, UNION GAS COMPANY OF CANADA, LIMITED, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Michigan Consolidated Gas Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on July 16, 1957, affirming an order of the Federal Power Commission.

OPINIONS BELOW

The decision of the Presiding Examiner (R. 19,233-367) is unreported.[1] The opinion and order of the

[1] Nine extra copies of the Joint Appendix, printed in the court below, are being lodged with the Clerk and will be referred to in this petition as "R. ."

Federal Power Commission (R. 19,795-830) are reported at 15 F.P.C. 46 and the Commission's order denying rehearing (R. 19,915-18) is reported at 15 F.P.C. 870. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, pp. 6a-21a, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals, printed in Appendix C, *infra*, p. 22a, was entered on July 16, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

An interstate pipeline company, which had excess natural gas available on an off-peak or interruptible basis, proposed to export such gas at unregulated rates to Canada. The company was unwilling to develop its storage field in the United States and thereby utilize the gas in question to meet the unsatisfied peak day requirements of its United States customers. At the same time, the company relied on such unsatisfied requirements in support of its proposed abandonment of its long standing service to petitioner. The questions are:

(1) Whether a pipeline company's export proposal is "consistent with the public interest" under Section 3 of the Natural Gas Act when its utility customers in the United States have large unsatisfied demands for natural gas.

(2) Whether the Commission's lack of authority to order development of the pipeline company's storage field relieved the Commission of any duty to determine whether the gas proposed to be exported should be

stored in that field and thereby utilized to meet the peak day requirements of the company's customers in the United States.

STATUTE INVOLVED

The statutory provisions involved are Sections 3 and 7 of the Natural Gas Act, 15 U.S.C. § 717, which are printed in Appendix A, *infra*, pp. 1a-5a.

STATEMENT

Petitioner is a public utility engaged in the distribution and sale of natural gas in a number of important communities in Michigan, including Detroit. For many years petitioner has purchased 125,000 Mcf of natural gas per day at Detroit from Panhandle Eastern Pipe Line Company ("Panhandle"), which owns and operates a natural gas pipeline system extending from producing fields in the southwest to termini in Michigan, Illinois, Indiana and Ohio. Panhandle supplies gas to over 50 public utility customers for resale, Michigan Consolidated being one of Panhandle's largest customers.[2]

Upon application filed under Section 3 of the Natural Gas Act, the Federal Power Commission granted Panhandle authority to export to Union Gas Company of Canada, Limited ("Union") 15,500,000 Mcf of natural gas per year for 20 years at a price of 35 cents per Mcf or 120% of Panhandle's regulated rates to its utility customers in Michigan, whichever is *higher*. Since the contract covering the 15,500,000 Mcf per year provides that deliveries may be inter-

[2] Petitioner obtains the balance of its natural gas requirements from two affiliated pipeline companies, Michigan Wisconsin Pipe Line Company and American Louisiana Pipe Line Company.

rupted on any particular day, the gas is thus technically sold as "interruptible" or "off-peak" gas.

Union proposes to use this additional supply of gas to convert the City of Hamilton, Ontario, from manufactured to natural gas and to supply distribution companies serving several other cities in Ontario. In order thus to utilize Panhandle's off-peak gas to meet firm requirements, Union proposes to employ its underground storage fields in Ontario, in which the gas will be stored for use in periods of peak consumption.

At the same time that Panhandle sought authority to export this gas to Canada, the requirements of its utility customers in the United States remained unsatisfied. In connection with a proposal to expand its pipeline capacity by 455,000 Mcf per day, Panhandle entered into agreements with most of its customers covering the delivery of this increased capacity. But Panhandle thereafter drastically reduced its expansion program with the result, as the Presiding Examiner here found, that:

> "* * * the *present* firm peak day requirements of Panhandle's customers are at least 187,200 Mcf per day in excess of Panhandle's capacity as increased to that hereinafter authorized." (R. 1243)[3]

Moreover, Panhandle had long sought permission to reduce its deliveries of gas to Petitioner from 125,000 Mcf to 87,500 Mcf per day,[4] and more recently Pan-

[3] Italics are supplied throughout this petition unless otherwise indicated.

[4] See *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 236 F. 2d 289 (3rd Cir. 1956); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 204 F. 2d 925 (3rd Cir. 1953).

handle filed an application to abandon *all* of its deliveries to petitioner on the ground that "the needs of Panhandle's customers other than Michigan Consolidated, for the volumes which will be released by the abandonment of service to Michigan Consolidated, are very urgent." Petitioner therefore contended that, to permit Panhandle to export large volumes of natural gas to Canada while the requirements of its domestic customers remained unsatisfied, violated the plain provisions of Section 3 of the Act.

Panhandle argued that the unsatisfied demands of its utility customers in the United States are for increased firm, peak-day deliveries (*i.e.*, volumes of gas Panhandle is committed to deliver to resale customers on days of peak consumption), whereas the gas it proposes to export to Canada is off-peak or interruptible gas, which is the excess gas available on days when the firm consumption is less than the capacity of the system.

In response to this contention, petitioner showed that Panhandle owns a large storage field in Michigan, known as the Howell Field, in which Panhandle could readily store the gas it proposes to export to Canada and thereby utilize such gas to meet the unsatisfied peak day requirements of its domestic customers.[5] As previously stated, this is precisely how Union proposes to

[5] The Commission has repeatedly emphasized the great value of an underground storage field, which permits a pipeline company to inject into the field the gas which is not required to meet the demands of its customers during the summer months and to withdraw that gas during the winter months to meet the increased requirements of its customers for space heating. *Michigan Wisconsin Pipe Line Co.*, 6 F.P.C. 1, 10 (1947); *Trans-Continental Gas Pipe Line Co., Inc.*, 7 F.P.C. 24, 40 (1948).

use the gas to meet the firm requirements of its new markets.

The Presiding Examiner denied Panhandle's export application. He found that:

> "Uncontradicted evidence presented by Michigan Consolidated shows that the Howell Field would now make a desirable storage field and that the field has ample capacity to store the 15,500,000 Mcf per year which Panhandle seeks to export. * * * Other evidence shows that the present firm peak day requirements of Panhandle's customers are at least 187,200 Mcf per day in excess of Panhandle's capacity as increased to that hereinafter authorized. And by the customers' estimates, their firm peak-day requirements will be still greater in the immediate future." (R. 1242-3)

The Examiner therefore concluded:

> "This evidence justifies the denial of the proposal to export gas. While it may be that the Commission cannot require Panhandle involuntarily to develop the Howell Field for storage (*Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission, supra,* 204 F. 2d 675, 680), the Commission can properly deny the application for authorization to export on the ground that, with such volumes at its disposal, Panhandle has the means, through storage, to meet unsatisfied peak-day requirements of those customers." (R. 1243)

The Commission reversed the Presiding Examiner's decision and issued an order authorizing exportation of the gas to Canada. It concluded, in two sentences, that petitioner's evidence regarding the Howell Field, although uncontradicted, was "incomplete" and that evidence was lacking as to several factors "which it is necessary to consider in deciding whether or not the

Howell Field can or should be developed for storage" (R. 1318). The Commission then found, in the language of Section 3, that the evidence did not show that "the proposed exportation * * * will not be consistent with the public interest." (R. 1319).

The court below affirmed the Commission's order, Judge McLaughlin concurring only in the result. The court stated that "Panhandle's customers require peak-day volumes of gas whereas the gas to be exported to Union is non-peak interruptible gas which would be of no use to them." The court rejected petitioner's contention that, by utilization of Panhandle's Howell Storage Field, the gas could be used to meet unsatisfied peak day demands of Panhandle's customers. It held that since the Commission's authority to order Panhandle to develop and utilize its Howell Field for storage is "more than doubtful," the Commission was under no obligation to ascertain the feasibility of such "an alternative proposal." (Appendix B, *infra*, p. 16a)

REASONS FOR GRANTING THE WRIT

This case presents important questions involving the authority and statutory duties of the Federal Power Commission with respect to the exportation of natural gas under Section 3 of the Natural Gas Act which have not been and should be settled by this Court. In addition, the decision of the court below is contrary to that of the Court of Appeals for the District of Columbia in *City of Pittsburgh, et al.* v. *Federal Power Commission*, 237 F. 2d 741 (1956).

(I) This Case Involves Important Interpretations of Section 3 of the Natural Gas Act.

Section 3 of the Natural Gas Act prohibits the exportation or importation of natural gas if the Federal Power Commission finds, after hearing, that the proposal "will not be consistent with the public interest." This section has become one of the most important provisions of the Act because of the numerous proposals to export and import natural gas to and from Canada and Mexico.[6] In view of the inconsistent positions which the Commission has taken in administering Section 3 of the Act[7] and particularly its departure in this case from its previous applications of the "public interest" standard, it is essential that this Court

[6] Pacific Northwest Pipeline Corporation has been authorized to import up to 300,000 Mcf of natural gas per day from Canada for service to markets in the Pacific Northwest (Op. 289 issued November 25, 1955 in Docket Nos. G-8932, *et al.*). Montana Power Company has been authorized to import up to 100,000 Mcf per day for service to its markets (order issued May 19, 1955 in Docket Nos. G-2805, *et al.*). Tennessee Gas Transmission Company is seeking authority in Docket Nos. G-9449, *et al.*, to export up to 86,000 Mcf a day to Canada for service to Montreal. Midwestern Gas Transmission Company has a pending application in Docket Nos. G-9451, *et al.*, to import 200,000 Mcf a day from Canada for service to markets in the Midwest. Texas Eastern Transmission Corporation has been authorized to import 200,000 Mcf per day from Mexico for service to its markets (16 F.P.C. 27).

[7] The Commission denied Westcoast Transmission Company, Inc. authorization to import natural gas from Canada on the ground that "it would not be in the public interest" for any community in the United States to be entirely dependent on a gas supply from Canada (Opinion 271 issued June 18, 1954 in Docket Nos. G-996, *et al.*). Two years later the Commission held that the views expressed in that opinion "disapproving of reliance in this country on Canadian gas as a sole source of supply *should not be permitted to stand*" (16 F.P.C. 486, 488).

determine whether the Commission "has been guided by proper considerations" in its interpretation of Section 3.[8]

In this case, the Commission, with the approval of the court below, authorized Panhandle to export large quantities of natural gas to Canada at a time when the requirements of Panhandle's domestic resale customers are admittedly not being met and Panhandle is actually attempting to abandon its entire service to petitioner. Panhandle's motives are perfectly plain. Under its contract with Union, which involves a sale to Canada and therefore is not subject to rate regulation by the Commission, Panhandle will receive 35 cents per Mcf or 120 per cent of Panhandle's regulated rates in Michigan, whichever is *higher*.[9] Panhandle's proposed export is thus another facet of its announced program of seeking extra profits by making sales which are not subject to rate regulation by the Commission.[10]

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[8] In *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. 86, 91 (1953), this Court said:

> "It is our responsibility to say whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear on applications for licenses in the public interest."

[9] Since the price of 35 cents per Mcf is approximately 9 cents per Mcf more than Panhandle's current regulated rate in Michigan, Panhandle would receive an additional $1,395,000 annually from the sale of the proposed volume to Canada.

[10] Panhandle has repeatedly attempted to sell its interruptible gas directly to industrial customers at unregulated rates. These attempts by Panhandle to skim off "the cream of the volume business" to the great detriment of the distributing companies and the consuming public have been repeatedly condemned. *Panhandle Eastern Pipe Line Company* v. *Michigan Public Service Commission*, 341 U. S. 329, 334 (1951); *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U. S.

Since "the primary aim of this legislation was to protect consumers," *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 610 (1943), and since the consumers to be protected are those in the United States, the "public interest" does not permit the exportation of natural gas under Section 3 of the Act when there are unsatisfied domestic requirements for such gas. This conclusion would appear self-evident but, in any event, it is confirmed by the legislative history and the Commission's prior construction of Section 3. For example, in the debate on the bill, the sponsor of the legislation in the Senate stated:

> "MR. WHEELER. That is for the purpose of conserving our natural gas in the event we wanted to conserve it. Suppose, for instance, that natural gas were being transported from this country into Canada *when we had a shortage of natural gas*, or suppose we were selling quantities of natural gas to foreign countries when we should not do it." (81 Cong. Rec. 9313)

This interpretation of the Act is also reflected in the Commission's regulations, which provide that applications for authorization to export gas shall contain a statement of the reasons why the proposed exportation "will not *in any way* impair the ability of the applicant to render natural gas service at reasonable rates *to its customers in the United States*" (18 C.F.R. § 153.3 (h)).[7] In accordance with that requirement, the Commission has heretofore consistently refused to approve proposed exportations of gas which would adversely

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507, 521 (1947); *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission*, 232 F. 2d 467, 472, (3rd Cir. 1956), *cert. denied*, 352 U. S. 891.

affect the applicant's ability to render adequate service to its domestic customers.[11]

In this case, for the first time, the Commission approved the exportation of natural gas which is clearly and urgently needed to meet the requirements of Panhandle's utility customers. That this represented a radical departure from prior policy is well illustrated by the fact that the Commission here omitted an important condition which it had heretofore attached to export authorizations.

In prior proceedings it was the Commission's practice to attach a condition to the export authorization providing that consumers in the United States are to have *preference* over service to the foreign country and that the export authorization should not be ground for refusal by the pipeline company to meet requirements in the United States. This condition was imposed, for example, when Panhandle was authorized in 1946 to export 5,500,000 Mcf per year to Union (5 F.P.C. 472, 475), and it was imposed upon Reynosa Pipe Line Company in a case which was reviewed by the Court of Appeals for the Fifth Circuit, *Cia Mexicana De Gas, S.A.* v. *Federal Power Commission,* 167 F. 2d 804, 807, fn. 4(e) (1948). In this case, however, Union stated categorically (R. 1239) that if such a condition were imposed it could not go forward with its construction program and that it required an "unrestricted export permit" (R. 152-3). The Commission acquiesced in Union's demand that the condition be omitted.

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[11] *Panhandle Eastern Pipe Line Co.*, 7 F.P.C. 48, 76 (1948); *Panhandle Eastern Pipe Line Co.*, 10 F.P.C. 328, 339 (1951); Compare, *e.g.*, *United Gas Pipe Line Co.*, 2 F.P.C. 775, 776 (1940); *Panhandle Eastern Pipe Line Co.*, 5 F.P.C. 472, 474 (1946).

The court below failed to appreciate the significance of this departure from the Commission's prior practice, because the court read a provision of the order permitting the authorization to be modified or terminated upon further order of the Commission as the substantial equivalent of the omitted condition (Appendix B, *infra*, p. 17a). But the two conditions are entirely different in scope. Under the omitted condition the requirements of consumers in the United States must be met *before* any gas is exported. The condition here prescribed, on the other hand, merely permits a *future* modification of the export authorization and is little more than a paraphrase of the last sentence of Section 3 of the Act.

The Commission's departure in this case from its prior policy is the more significant because that policy was reported to Congress,[12] which thereafter amended the Act without changing the provisions thus interpreted. This Court has frequently pointed out that the administrative interpretation of the statute under such circumstances is entitled to great weight.[13]

The Commission's conclusion, affirmed by the court below, that the "public interest" under Section 3 of the Act permits the exportation of gas when the fact is that the gas is urgently needed by consumers in the United States, calls for this Court's full consideration upon briefs and argument.

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[12] Twenty-Sixth Annual Report of the Federal Power Commission for the year 1946 (p. 65).

[13] See, *e.g.*, *Great Northern R. Co.* v. *United States*, 315 U. S. 262, 275-76 (1942); *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 115 (1939).

(II) The Decision of the Court Below Is in Conflict With a Decision of the Court of Appeals for the District of Columbia

The decision of the court below is in conflict with the decision of the Court of Appeals for the District of Columbia in *City of Pittsburgh, et al.* v. *Federal Power Commission*, 237 F. 2d 741 (1956), in two important respects. First, the court below concluded that the Commission's lack of authority to order utilization of Panhandle's Howell Storage Field relieved the Commission of any duty to determine whether the gas proposed to be exported should be stored in that field and thereby used to meet the peak day requirements of Panhandle's customers in the United States. Second, the court below refused to consider Panhandle's proposed abandonment of its entire service to Petitioner despite the direct relationship between that proposal and the need of Panhandle's customers in the United States for the gas proposed to be exported.

(A) The Commission attempted to justify its departure in this case from its prior practice on the ground that the gas to be exported is off-peak or interruptible gas, whereas Panhandle's domestic customers need increased peak-day deliveries. The court below adopted the same position, saying:

> "* * * Panhandle's customers require peak-day volumes of gas whereas the gas to be exported to Union is non-peak interruptible gas which would be of no use to them." (Appendix B, *infra*, p. 15a)

But petitioner pointed out to the Commission that the off-peak gas Panhandle proposes to export *could* be used to meet the firm peak day requirements of its domestic resale customers by utilization of its Howell Field. Petitioner went even further. It introduced uncontradicted evidence of the feasibility of that op-

eration, which the Examiner concluded was more than adequate to show that "Panhandle has the means, through storage, to meet unsatisfied peak-day requirements of those customers" (R. 1243).[14]

The Commission reversed the Examiner's determination on the ground that this evidence was "incomplete" but made no further inquiry as to the feasibility of the storage project. The Commission also rejected petitioner's request that Panhandle be required to show cause why the Howell Field should not be utilized to meet the peak-day requirements of its domestic customers, and simply concluded that exportation of the gas is not inconsistent with the public interest.

As previously stated, the court below affirmed the Commission's order on the ground that since the Commission's authority to order Panhandle to develop and utilize its Howell Field for storage is "more than doubtful," the Commission was under no obligation to ascertain the feasibility of such "an alternative proposal." But the fact that the Commission cannot affirmatively direct Panhandle to utilize the Howell Field does not mean that, if utilization of the field would alleviate domestic peak day shortages, the Commission cannot and should not deny authority to export the gas.

In this respect the decision of the court below conflicts with that of the Court of Appeals for the District of Columbia in *City of Pittsburgh, et al.* v. *Federal*

[14] In prior proceedings Panhandle itself relied upon the availability of its Howell Field as an underground storage reservoir to support its proposal to take on a new direct sale customer (R. 454; 884-6).

Power Commission, 237 F. 2d 741 (1956). There, Texas Eastern Transmission Corporation sought to abandon natural gas service through its "Little Inch" pipeline, claiming that expansion of its entire system was not feasible without such abandonment. Opponents of the abandonment thereupon suggested an alternative method of expanding the system without abandonment of Little Inch, but the Commission refused to permit the inquiry on the ground that it had no jurisdiction to consider any alternatives to the specific proposal made by the applicant. The court held this to be error, stating:

> "The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity. *That the Commission has no authority to command the alternative does not mean that it cannot reject the proposal.*" (237 F. 2d at 751, fn. 28)

The *City of Pittsburgh* case thus holds that in determining the public interest, the Commission *must* consider alternative proposals to the program proposed by the applicant, even though it has no power to require the applicant to adopt such alternatives. The decision below, on the other hand, holds that the Commission need *not* consider more desirable alternative proposals, in determining the public interest, if it has no power to compel the applicant to adopt such proposals.

The restrictive views of the court below are not limited to determinations of the "public interest" under Section 3 of the Act but are equally applicable to determinations of the "public convenience and necessity" under Section 7 of the Act. This is well illustrated by the fact that a majority of the court below

held, in a case involving another provision of the order here under review, that the Commission could not condition the granting of a certificate of public convenience and necessity to Panhandle upon a requirement that Panhandle revise its expansion program so as to remove admitted discrimination against one of its utility customers.[15]

We submit that the lower court is wrong and the Court of Appeals for the District of Columbia is correct. The Commission is not simply an umpire deciding between rival private interests. Its function is to determine what will *best* serve the "*public* interest" and the "*public* convenience and necessity."[16] The Presiding Examiner in this case found that petitioner by its own testimony had established the feasibility of using the Howell Field for storage (R. 1242). While the Commission apparently thought more information was needed, it did not call upon Panhandle, which owns the field and is in possession of all the facts, to produce such information.

Such a procedure is by no means "novel," as the court below seemed to believe. On the contrary, the Commission has specifically required other pipeline companies, as a condition of their certificates of public convenience and necessity, to investigate and submit reports on the feasibility of their development of underground storage facilities (See, *e.g.*, *Transconti-*

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[15] *The Central West Utility Company* v. *Federal Power Commission*, (3rd Cir. No. 12,118, — F. 2d —, decided August 6, 1957).

[16] *Civil Aeronautics Board* v. *State Airlines*, 338 U. S. 572, 578-581 (1950); *National Labor Relations Board* v. *Mall Tool Company*, 119 F. 2d 700, 702 (7th Cir., 1941); *Roof* v. *Conway*, 133 F. 2d 819, 827 (6th Cir., 1943).

ental Gas Pipe Line Corporation, 7 F.P.C. 24, 41, 47 (1948); 9 F.P.C. 32, 48 (1950)).

The lower court's restrictive view of the Commission's duty and authority is thus inconsistent with the decision in the *City of Pittsburgh* case and contrary to the basic purposes of the statute.

(B) A further conflict between the decision below and that in the *City of Pittsburgh* case arises from the lower court's refusal to consider Panhandle's pending application to abandon its entire service to petitioner.

The court pointed to the failure of Panhandle's customers, other than petitioner, to object to Panhandle's export application as indicating that there is no unsatisfied demand for such gas on Panhandle's system. At the same time the court stated with reference to Panhandle's application to abandon all service to petitioner:

> "Michigan Consolidated also urges, in opposition to the export order, that Panhandle in another proceeding seeks to curtail service to Michigan Consolidated *on the basis of unsatisfied demands of its peak-day customers.* There is a long history of controversy between these two companies. If the past is any indication this question will one day come before a court of appeals for determination. But it is not here today on the present record and *we do not consider it.*" (Appendix B, *infra*, p. 17a).

The finding of the Presiding Examiner that the peak day requirements of Panhandle's customers "are at least 187,200 Mcf per day" in excess of Panhandle's capacity (R. 1243) was not questioned by the court or the Commission. Moreover, whatever may have been the reasons for the failure of Panhandle's other cus-

tomers to object to the export proposal, the undisputed fact is that their requirements remain unsatisfied.[17] This is shown by Panhandle's attempt to abandon its service to petitioner in order to meet the "very urgent" needs of its other customers.

The refusal of the court below to consider Panhandle's abandonment proposal, while at the same time suggesting the absence of any unsatisfied domestic demands for the gas to be exported, was clearly in error. There is an admitted, undisputable need for additional firm gas on the part of Panhandle's domestic customers, who are seeking to make up their current shortages by laying claims to the gas Panhandle now proposes to withdraw from petitioner. In short, Panhandle hopes to make up in part the shortages that now exist on its line by transferring to its other customers the gas it now sells to petitioner. If Panhandle's scheme is successful, petitioner and the consuming public it serves will be the ultimate victims of Panhandle's exportation to Canada of gas which is vitally needed in the United States.

The refusal of the lower court to consider Panhandle's proposed abandonment of its service to petitioner is contrary to the decision in the *City of Pittsburgh* case. There, the Commission refused to consider whether the applicant's proposal would make future expansion of the system more expensive even though the applicant admitted that it intended to apply for authority to expand its facilities and subsequently did so while the case was in the Court of Appeals upon

[17] At least one of Panhandle's other resale customers has now been alerted to the dangers of the export proposal. Illinois Power Company attempted to intervene in the court below to protest the order of the Commission, but the court denied leave to intervene.

review. The court held this to be in error, stating in part:

> "The Commission's basic argument in opposing consideration of the question of expansion is, first, that the application which gave rise to the order and to this petition contained no provision for expansion; and second, that any interest of the petitioners which may be affected by a separate application for authority to expand can be urged at the hearing on such application. This argument disregards the gist of petitioners' position: that the present abandonment of Little Inch must inevitably increase the cost of any future expansion. If, as petitioners say, present conversion of Little Inch to petroleum products transportation means that future expansion of Texas Eastern's gas service will be costlier, that factor *must be considered now.*" (237 F. 2d at 752)

Here, the court below held that the pendency of Panhandle's abandonment application need not now be considered despite its direct bearing upon the need of Panhandle's resale customers for additional supplies of gas, and thus upon the question whether the public interest permits the proposed exportation. In the *City of Pittsburgh* case, on the other hand, the court held that the applicant's future expansion program must be considered in connection with its current application because of the interrelation between the two. The decisions of the two courts are in this respect wholly opposed in reasoning and conclusion.

CONCLUSION

This case presents important questions under Section 3 of the Natural Gas Act and a clear conflict with a decision of another court of appeals. For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, U. S. C. § 717 *et seq.* are as follows:

Exportation or Importation of Natural Gas

Sec. 3. After six months from the date on which this act takes effect no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

* * * * * * * * * *

Extension of Facilities; Abandonment of Service

Sec. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such

natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the

Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice of hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed

service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or

proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

* * * * * * * * * * *

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,069

MICHIGAN CONSOLIDATED GAS COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

ON PETITION TO REVIEW AN ORDER OF THE
FEDERAL POWER COMMISSION

Argued May 10, 1957

Before MARIS, McLAUGHLIN and KALODNER, *Circuit Judges.*

OPINION OF THE COURT

(Filed July 16, 1957)

By MARIS, *Circuit Judge.*

This is a proceeding to review portions of an order of the Federal Power Commission issued June 30, 1956 pursuant to its opinion No. 292.[1] The petitioner for review, Michigan Consolidated Gas Company, asks this court to set aside paragraphs (H) and (I) of the order[2] which

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[1] 15 F.P.C. 46.

[2] "(H) Panhandle is hereby authorized, subject to the conditions specified herein, to export natural gas from the United States into the Dominion of Canada for sale and delivery to its present

authorized Panhandle Eastern Pipe Line Company to export natural gas for sale to Union Gas Company of

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customer Union Gas Company of Canada, as hereinabove described and as more fully set forth in its application in Docket No. G-2475.

"(F) The authorization to export natural gas granted under paragraph (H) hereof is subject to the following terms and conditions:

"(i) Panhandle shall make, keep, and preserve full and complete records with respect to the natural gas herein authorized to be exported, and shall file with the Commission annual reports showing, by months, the quantities of gas exported during the preceding calendar year, together with the volumes exported on the peak day of each month and such other reports with respect to such exportation as the Commission may deem necessary and in such form and manner as the Commission may prescribe.

"(ii) The authorization hereby granted may be modified from time to time or terminated; after opportunity for hearing, upon further order of the Commission, but in no event shall such authorization extend beyond termination of the Presidential Permit relating to this authorization.

"(iii) This authorization to export natural gas to Canada shall not be transferred in any manner whatsoever, but such authorization shall continue in effect for a reasonable time in the event of involuntary transfer of the facilities used thereunder by operation of law (including transfers to receivers, trustees, or purchasers under foreclosure or judicial sale) pending the making of an application for permanent authorization and decision thereon, provided notice is promptly given in writing to the Commission accompanied by a verified statement that the facts relating to sufficiency of supply, rates, and nature of use remain substantially the same as before the transfer.

"(iv) This authorization shall be effective only so long as Panhandle complies with the conditions of this order and continues the operations hereby authorized in accordance with the Natural Gas Act and all pertinent rules, regulations, or orders heretofore or hereafter issued by the Commission.

"(v) Panhandle shall, within thirty (30) days of the issuance of this order, file an application to amend the Presidential Permit under which it is presently making existing export deliveries to Union Gas Company of Canada, to conform to the authorizations herein granted."

Canada and to remand to the Commission for modification paragraph (B) of the order[3] under which certain conditions were attached to a certificate of public convenience and necessity issued to Panhandle. The proceedings resulted from the filing of a series of applications by Panhandle and its affiliate, Trunkline Gas Company, both of which are natural gas companies, for certificates of public convenience and necessity under section 7(c) of the Natural Gas Act[4] authorizing the proposed expansion of the natural gas facilities of the Panhandle system and the allocation of the resulting increased volumes of gas among its customers. Panhandle also sought an order under section 3 of the Act[5] permitting the export of additional[6] volumes of natural gas to Union Gas Company of Canada. The proceedings also involved various other companies, communities, commissions and organizations either seeking service from the Panhandle system or intervening in opposition thereto.

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[3] "(B) As conditions attached to the exercise of the rights granted to Panhandle by paragraph (A) above:

"(i) Panhandle shall serve its resale customers with volumes of gas equal to the winter contract demands approved by the Commission in Appendix A of its order of October 5, 1955, as corrected, during the winter months, unless modified in accordance with the provisions of the Natural Gas Act, and the Commission's Rules and Regulations; and Panhandle shall serve, under the S-1 Rate Schedule, the volumes of storage gas which it proposes to sell to Michigan Gas Storage Co. and The East Ohio Gas Co.

"(ii) The facilities being authorized shall not be used for the transportation or sale of natural gas to any new customer except upon specific authorization of the Commission."

[4] 15 U.S.C.A. § 717f(c).

[5] 15 U.S.C.A. § 717b.

[6] Since 1946 Panhandle has been exporting to Union Gas Company of Canada upon an interruptible off-peak basis 5,500,000 Mcf of natural gas per year under authority from the Commission. 5 F.P.C. 472.

Panhandle owns and operates an integrated natural gas pipe line system which extends from its sources of supply in the Hugoton and Panhandle fields in Texas, Oklahoma and Kansas through the states of Missouri, Illinois, Indiana and Ohio to northern termini in Michigan. By means of its expansion program Panhandle proposed to increase the peak-day deliverability of its system by 455,000 Mcf of natural gas, thereby increasing its peak-day capacity from an estimated 970,000 Mcf per day to an estimated 1,425,000 Mcf per day.[7] This expansion was to be accomplished by the installation of additional loop and lateral pipe lines and compressors and by the development of a natural gas storage field near Waverly, Illinois. In connection with this expansion program Panhandle entered into agreements with its customers, not including Michigan Consolidated, for increased deliveries of natural gas. Subsequently, Panhandle amended its application by eliminating therefrom the proposed additional compressor facilities and the proposed development of the storage project at Waverly Field, substituting instead additional expansion of its main line and compressor capacity plus additional facilities for its subsidiary, Trunkline. While this change somewhat reduced the additional peak-day capacity which Panhandle sought to obtain from its expansion program from 455,000 Mcf to approximately 260,000 Mcf it actually increased the enlargement effected by the program in the annual capacity of the system. During the course of the consolidated proceedings, as Panhandle's capacity was increased and became operable the Commission issued temporary permits authorizing increases in deliveries to existing customers in the United States until a total increased delivery of upwards of 260,000 Mcf per day was authorized. In the meanwhile, Panhandle renegotiated its contracts with its customers, reducing the amounts of peak-

[7] This phase of the program was proposed in Panhandle's application filed on May 18, 1954, F.P.C. Docket No. G-2433.

day deliveries originally agreed upon when Panhandle had proposed to enlarge its capacity by 455,000 Mcf per day.

In July, 1954, Panhandle filed its application[8] for authority to export 15,500,000 Mcf of natural gas per year for 20 years to the Union Gas Company of Canada, pursuant to a contract with that company dated April 21, 1954, for the purchase of the gas by it on an interruptible basis for storage and resale for domestic, commercial and industrial processing uses in various communities in southwestern Ontario. The contract provided for the delivery to Union of annual volumes of natural gas, in addition to 5,500,000 Mcf which had been authorized by the Commission in 1946, amounting to 10,500,000 Mcf in the first year, with annual increases of 1,000,000 Mcf in each year thereafter until a maximum of 15,500,000 Mcf would be reached during the last 15 years of the contract. The price agreed upon was 35¢ per Mcf, or 120% of Panhandle's regulated price to general service customers in Michigan, whichever is higher. Approximately two-thirds of the annual volume of gas purchased under the contract would be delivered during the seven summer months, April through October. The remainder would be delivered during the five winter months. Panhandle would be obligated to deliver during the summer months not less than 92% of the scheduled volume of gas, during the winter months not less than 88% of the scheduled volume, and on an annual basis not less than 90% of the annual volume. The Commission's approval of the export to Union in Canada of this increased volume of gas is the core of the controversy in this case.

Union is engaged in the storage, transportation and distribution of natural gas in the city of Windsor and other communities in southwestern Ontario. It produces a portion of its gas requirements from its own wells in Ontario and purchases the remainder from local producers

[8] F.P.C. Docket No. G-2475.

and Panhandle. It operates a large storage field and takes gas from Panhandle on an interruptible basis, receiving no firm or peak-day deliveries. Union's principal purpose in negotiating the new contract with Panhandle was to make natural gas available to the Hamilton, Ontario, market. Since 1946 Panhandle has been authorized to sell and export to Union in Canada, pursuant to a contract of November 25, 1944 with Union, 5,500,000 Mcf of natural gas annually during the summer months. The Commission's authorization for the export of this gas given by order issued April 23, 1946 was made subject to the condition that at all times persons and municipalities in the United States should receive preferential service.[9]

The petitioner, Michigan Consolidated Gas Company, is a public utility engaged in the purchase, production, storage, transportation, distribution and sale of natural gas in Michigan. It purchases from Panhandle 125,000 Mcf of natural gas per day at Detroit and 2,000 Mcf per day at Ann Arbor and obtains the balance of its natural gas requirements from two affiliated pipe line suppliers, Michigan-Wisconsin Pipe Line Company and American Louisiana Pipe Line Company, in the American Natural Gas Company system.

All the proceedings which arose out of the applications for certificates, together with the export application, were consolidated for hearing by the Commission's presiding examiner. Michigan Consolidated intervened in opposition to Panhandle's export application and in the certificate proceedings. The presiding examiner rendered his decision on March 6, 1956. The Commission heard argument on exceptions thereto by Michigan Consolidated. Its opinion No. 292 and accompanying order were issued on June 30, 1956 approving Panhandle's application to export the requested additional volumes of natural gas to Union

[9] Panhandle Eastern Pipe Line Company, 5 F.P.C. 472, 475.

and authorizing the certificates of public convenience and necessity as requested by Panhandle and Trunkline.[10] An application for rehearing by Michigan Consolidated was denied on August 26, 1956. This petition for review of the Commission's order followed.[11]

In considering Michigan Consolidated's attack upon the order here under review we must bear in mind at the outset that the findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.[12] It is a well settled rule that so long as there is warrant in the record for the judgment of the expert body, it must stand.[13]

This principle, which this court reiterated in Michigan Consol. Gas Co. v. Federal Power Com'n, 1953, 203 F. 2d 895, is applicable here. In the case just cited we said (p. 900):

> ". . . The problem of the allocation of service to various customers is one which calls for judgment within the Commission's peculiar and expert competence. Judicial review of the Commission's orders with respect to this question is, we think, limited by the rule as to the review of rate orders laid down by the Supreme Court in Federal Power Comm. v.

[10] 15 F.P.C. 46.

[11] The County of Wayne, Michigan, which includes Detroit, is wholly supplied by Michigan Consolidated. The county was granted leave to file a brief amicus curiae in support of Michigan Consolidated's objections to the order. Panhandle and Union have intervened in support of the Commission's order.

[12] Section 19(b) of the Natural Gas Act, 15 U.S.C.A. § 717r(b).

[13] Miss. Valley Barge Co. v. U.S., 1934, 292 U.S. 282, 286-287; Rochester Tel. Corp. v. U.S. 1939, 307 U.S. 125, 145-146; Power Comm'n. v. Hope Gas Co., 1944, 320 U.S. 591, 602; F.C.C. v. Jersey City, 1944, 322 U.S. 503, 513.

Natural Gas Pipeline Co., 1942, 315 U.S. 575, 586, 62 S. Ct. 736, 743, 86 L.Ed. 1037, as follows:

> "Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.'"

We must also keep in mind the fact that the gas proposed to be exported to Union is off-peak gas largely for storage, the delivery of which will be interruptible on days of heavy and peak demand on the Panhandle system. Its export, therefore, will not reduce in any way the amount of gas which Panhandle will have available to meet the winter peak-day requirements of its firm-demand customers, but will enable Panhandle to employ on off-peak days some of its peak-day capacity which would otherwise be idle.

With these considerations in mind we turn to the specific arguments which Michigan Consolidated advances in support of its contentions that the Commission erred in the order under review in granting Panhandle authority by paragraphs (H) and (I) to export additional gas to Union in Canada and in failing in paragraph (B) to impose conditions upon Panhandle's certificate of public convenience and necessity that instead of exporting gas to Canada it should store the gas in its Howell field for the use of its United States customers and in any event should offer the gas to Michigan Consolidated on its interruptible rate schedule I-1 before exporting any of it to Canada.

Michigan Consolidated first argues that the Commission exceeded its authority under section 3 of the Act[14] in authorizing the export of this gas to Union because it is needed in the United States and will impair Panhandle's ability to render adequate service to its local customers. This court has said in Manufacturers Light & Heat Co. v. Federal Power Com'n, 1953, 206 F. 2d 404, 407, that "What constitutes impairment of a natural-gas company's ability to render adequate service to its customers is not defined in the Act. Congress, therefore, committed to the Commission the determination, by application of its informed judgment upon the pertinent facts and circumstances presented by each case, whether such an impairment would result." Aside from this, however, there is no support in the record for the premise upon which Michigan Consolidated bases its contention. It relies on a statement by the presiding examiner that Panhandle's peak-day customers desire 187,200 Mcf per day more than Panhandle can supply. This finding rested upon the fact that Panhandle's original expansion program was based on estimates of its firm-demand customers for the use of 455,000 additional Mcf of natural gas on peak-days. When Panhandle reduced its expansion program the quantities of natural gas which would have been available to its firm-demand customers were also reduced. On the basis of this fact, Michigan Consolidated argues that Panhandle's service to its customers would be

[14] This section, in pertinent part provides:

". . . The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate." 15 U.S.C.A. § 717b.

impaired by the export of the gas to United. The conclusion thus sought to be drawn is a complete non sequitur, however, for the reason already pointed out that Panhandle's customers require peak-day volumes of gas whereas the gas to be exported to Union is non-peak interruptible gas which would be of no use to them. The Commission gave consideration to the fact that Panhandle's contract with Union did not contemplate peak-period deliveries but specifically provided for interruptions, and that Panhandle might curtail deliveries at any time, subject only to meeting seasonal requirements. We conclude that Michigan Consolidated has failed to show that the Commission erred in finding that Panhandle's service to its United States customers will not be threatened by the export of this interruptible gas to Union in Canada.[15]

Michigan Consolidated proposed an alternate plan which it here urges should have been accepted by the Commission. Its proposal was that Panhandle's Howell field in Michigan should be developed by Panhandle for storage of this interruptible gas which then could be utiiized for delivery to firm-demand customers on peak days. In considering this proposal it must be remembered in the first place that Michigan Consolidated has made no demand for this gas for itself on a firm basis. Nor did any of the other customers of Panhandle, whose "need" Michigan Consolidated so strongly champions here, raise their voices in demand for this gas. And in the second place, the Commission found that material evidence in respect to the availa-

[15] The Commission, in denying Michigan Consolidated's application for rehearing stated:

> "None of Panhandle's other customers has expressed any of the fears voiced by Michigan Consolidated of the possibility of impairment of service, and we cannot assume that the export authorization would endanger Panhandle's service to them. On the contrary, the facts respecting Panhandle's service to its existing domestic customers convince us that no such threat exists."

bility of the Howell field as a gas storage field was lacking in respect to geological matters, operational cost items and other factors which would be necessary to consider in determining whether or not this field should be thus developed. Michigan Consolidated argues that the Commission was under an obligation to secure this evidence and could have obtained it by requiring Panhandle to show cause why it should not develop the Howell field instead of exporting the gas to Canada. The most that can be said for this argument is that it is novel. In view of the lack of power of the Commission to require a natural gas company to enlarge its transportation facilities[16] the authority of the Commission to order the development of such a project is more than doubtful. However this may be, the burden of ascertaining the feasibility of an alternative proposal offered by an opposing party in a proceeding before the Commission is certainly not upon the Commission.

Another objection raised by Michigan Consolidated is that the Commission in this case will by its order impair service to domestic customers of Panhandle because in this order it has deviated from its prior policy in respect to the conditions to be attached to an export authorization. It argues that the 1946 export order was conditioned upon preferential service being given to United States customers. The record, however, shows that the Commission carefully considered this matter, stating:

> "We find, however, that as in certain other cases involving the exportation of gas, the public interest requires the imposition of a condition to this export authorization, providing that the authorization herein granted may be modified from time to time or terminated, after opportunity for hearing, upon further order of the Commission. This authorization shall not

[16] Panhandle Eastern Pipe Line Co. v. Federal Power Com'n., 3 Cir. 1953, 204 F. 2d 675.

extend beyond the date of termination of the Presidential Permit relating to this exportation of gas."

As we have seen, the Commission so provided in subparagraph (I)(ii) of the order under review. The terms of the condition were discretionary with the Commission and no abuse of discretion has been shown requiring modification of those terms.

Michigan Consolidated also urges, in opposition to the export order, that Panhandle in another proceeding seeks to curtail service to Michigan Consolidated on the basis of unsatisfied demands of its peak-day customers. There is a long history of controversy between these two companies.[17] If the past is any indication this question will one day come before a court of appeals for determination. But it is not here today on the present record and we do not consider it.

Michigan Consolidated's next point is that the export order should not have been issued because it desires this interruptible gas for itself and the Commission should, therefore, have required Panhandle under section 7(e) of the Act,[18] as a condition to the issuance of its certificate of public convenience and necessity, to offer 100,000 Mcf of gas per day to it under Panhandle's interruptible rate schedule I-1. The pertinent parts of this schedule are set out in a footnote.[19]

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[17] See, e.g., Panhandle Co. v. Michigan Comm'n., 1951, 341 U.S. 329; Michigan Consol. Gas Co. v. Panhandle Eastern Pipe L. Co., 6 Cir. 1949, 173 F. 2d 784; Michigan Consol. Gas Co. v. Federal Power Com'n., 3 Cir. 1953, 203 F. 2d 895; Panhandle Eastern Pipe L. Co. v. Federal Power Com'n., 3 Cir. 1956, 236 F. 2d 289.

[18] 15 U.S.C.A. § 717f(e).

[19] "1. AVAILABILITY

"This rate schedule is available to any Buyer under the General Service or Limited Service rate schedules for the purchase of natural gas from Seller at delivery points on the Seller's pipe-

It will be observed that schedule I-1 applies only to gas "in excess of that necessary to meet the firm, annual,

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line system within the States of Indiana, Ohio and Michigan on execution of a Service Agreement in the form prescribed under this tariff for service under this rate schedule.

"2. APPLICABILITY AND CHARACTER OF SERVICE

"This rate schedule shall apply to natural gas delivered by Seller to Buyer on an interruptible basis in excess of Buyer's Contract Demand. Gas sold and purchased hereunder shall be gas for resale for ultimate public consumption.

"3. RATE

"26.3 cents per M.c.f. of gas delivered during the month.

. . .

"7. PROCEDURE FOR OFFERING AND CURTAILING GAS UNDER THIS RATE SCHEDULE.

"Whenever Seller has gas available for sale in excess of that necessary to meet the firm, annual, and interruptible contract volumes, which Seller has been authorized to deliver in specific dockets, it shall offer not less than 20% of such gas to Buyers which own or control storage facilities for injection into storage as a part of such Buyer's regular storage program. The volume of gas determined to be available for storage requirements under the I schedules shall be divided among Buyers owning or controlling storage, and willing to contract for such gas, in proportion to the firm contract demands of those requesting such gas.

"Not less than one-half of the excess gas, remaining after the execution of contracts with Buyers owning or controlling storage facilities, shall be offered for contract on a non-discriminatory basis to all of its Buyers. The service agreement shall specify the maximum daily volumes for such interruptible service. All gas sold on an interruptible basis to both direct and resale customers may be interrupted at any time and in any amount in the sole discretion of Seller but only after reasonable notice to Buyers and direct customers and upon a non-discriminatory and non-preferential basis. On any day for which Seller has ordered curtailment of service, in whole or in part, under this rate schedule, all gas taken by a Buyer in excess of the reduced volume provided for under curtailment orders, shall be considered as delivered under Seller's applicable firm rate schedule." Panhandle Eastern Pipe Line Co., 1951, 10 F.P.C. 185, 215, modified, 13 F.P.C.

and interruptible contract volumes, which Seller has been authorized to deliver in specific dockets." Panhandle has been authorized by the order under review to deliver the interruptible gas in question to Union. The point which Michigan Consolidated here seeks to make therefore necessarily turns upon whether it has carried its burden of showing that the Commission exceeded its authority under section 3 of the Act in finding as it did that the export of the gas to Union is "consistent with the public interest,"[20] and in authorizing the export upon the basis of that finding. Reduced to its essentials, Michigan Consolidated's position is that under the provisions of Section 3 of the Act it was not consistent with the public interest for the Commission to take the action authorizing the export of Panhandle's gas to Canada since such action will prevent Michigan Consolidated from exercising its right to purchase this gas and that Panhandle's interruptible rate schedule I-1 requires that Michigan Consolidated should have been allowed to purchase the gas in question instead. The Commission carefully analyzed the evidence and found that Michigan Consolidated had not demonstrated that it had adequate or satisfactory markets for the gas. It concluded that it could not, on the record before it, authorize the sale of the gas to Michigan Consolidated and that the mere fact that Michigan Consolidated desired the gas did not make its export to Canada inconsistent with the public interest. In considering this matter the Commission stated:

> ". . . In the first place, we cannot find on this record that Michigan Consolidated has satisfactory markets for the volumes of gas it expresses a desire to purchase pursuant to the interruptible rate schedule. Of course, an essential ingredient of public convenience and necessity is adequate markets.

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[20] See Cia Mexicana de Gas v. Federal Power Commission, 5 Cir. 1948, 167 F. 2d 804, 806.

The survey made by Michigan Consolidated of its interruptible markets was an abstract one in which the cost of other fuels appears to have been the primary concern, and possible customers were not even specifically approached as to their willingness to purchase the gas. Further, the only valid existing interruptible rate of Michigan Consolidated is 42 cents, a figure too high to permit the sale of the interruptible gas. At the same time the 35-cent per Mcf rate under which Michigan Consolidated contends that it would sell the interruptible gas does not give consideration to charges for transportation through the distribution facilities of Michigan Consolidated nor, more important, has it been considered or approved by the Michigan Public Service Commission. In addition, under the company's proposal, the gas sought by Michigan Consolidated would be used almost in its entirety for boiler fuel in displacement of coal, a matter which although not of decisive importance of itself, is deserving of consideration. Thus, separate and apart from the provisions of Section 3 governing export sales, and the circumstances surrounding Panhandle's proposal for the exportation of gas, we could not on the record before us impose the condition which Michigan Consolidated seeks, requiring Panhandle to make the deliveries to it aforesaid.

"In contrast, turning again to the question of the requirements of Section 3, the circumstances we have detailed show that Panhandle's proposal to export gas is not inconsistent with the public interest. There is no boiler fuel use proposed by Panhandle and thus we are not approving a type of use for export which we do not favor for domestic purposes. Additionally, the contract for export provides for curtailment of export deliveries when such gas is

needed in the United States and such export will measurably increase the over-all load factor of Panhandle. On balance, we find that the record in this case would not support a finding that the proposed exportation is inconsistent with the public interest. It is appropriate to observe that, in the language of the Examiner although in a somewhat different context, 'it is consistent with the public interest for gas to be exported to our neighbor and ally, Canada'; and it is consistent also with the policies of cooperation and joint endeavor which have for so long characterized the relations of this nation and Canada not only in matters of defense, but also in matters relating to our respective economies, that the proposed increased deliveries to Union as requested by Panhandle be authorized."

These findings are supported by substantial evidence and the conclusions thus stated are clearly within the special competence of the Commission. We conclude that Michigan Consolidated has failed to show reversible error in those portions of the order of the Commission which it has asked us to review.

Paragraphs (B), (H) and (I) of the order of the Federal Power Commission issued June 30, 1956 will be affirmed.

Circuit Judge McLaughlin concurs in the result.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,069

MICHIGAN CONSOLIDATED GAS COMPANY, *Petitioner,*

vs.

FEDERAL POWER COMMISSION, *Respondent*

Present: Maris, McLaughlin and Kalodner, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that paragraphs (B), (H) and (I) of the order of the Federal Power Commission issued June 30, 1956 be, and the same are hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

July 16, 1957

Received & Filed Jul 16, 1957 Ida O. Creskoff, Clerk